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Our Reference: Prostitution
Date: 26 February 2018

Multi-Party Women's Caucus, Parliament
For Attention: Honourable RMS Morutoa, MP
By Email: bmantyi@parliament.gov.za

Honourable Madam Chairperson,

RE: SUBMISSIONS ON THE SALRC REPORT ON PROJECT 107 ON ADULT PROSTITUTION

- 1 We refer to the abovementioned matter, specifically the Parliamentary press statement on 8 February 2018, alerting stakeholders to submit inputs and responses to the South African Law Reform Commission's (SALRC's) Report 107 on Adult Prostitution (SALRC Report) for the purposes of the Multi-Party Women's Caucus' (MPWC) Summit to be held on 5 March 2018.
- 2 Cause for Justice ("CFJ/We") hereby want to thank the MPWC for the opportunity to present you with these written submissions, as may be amplified by oral representations at the Summit or at a later stage, and in so doing to be able to participate in the policy-making process.
- 3 We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights and related matters affecting the public interest in the context of adult prostitution and prostitution-related activities.

A. BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness. Four of CFJ's core values give it a particular interest in the law applicable to adult prostitution, namely (1) the responsible exercise of freedom, (2) protection of the family unit, (3) protection and promotion of human dignity/worth, and (4) protection of the vulnerable in society (social justice).

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Interest and background in matters pertaining to “sexual exploitation”

- 5 During 2013, 2014 and up to March 2015, CFJ was involved as one of three applicants in the “ICASA // StarSat (formerly TopTV)” judicial review case to overturn ICASA’s legally flawed decision to approve three dedicated pornographic channels as part of TopTV’s suite of channels in South Africa. The matter was disposed of in CFJ and its co-applicants’ favour in the Supreme Court of Appeal after a second failed ‘leave-to-appeal’ application by TopTV.
- 6 In addition, CFJ also made submissions to the Films and Publications Board later in 2015 as part of the public participation process on the Draft Online Content Regulation Policy and is a participant in the SALRC’s Project 107 - Sexual Offences: Pornography and Children (still on-going).
- 7 Furthermore, CFJ has been a stakeholder and active participant in the Parliamentary process on the Films and Publications Amendment Bill, 2015, which proposes (amongst other interventions) the legalising of online pornography in South Africa. The public participation process in the Portfolio Committee on Communications took place from April to October 2016 and the National Assembly is now preparing to debate and vote on the Bill at its Second Reading on 6 March 2018.
- 8 At present, CFJ has the backing of an intensive five-year track record in the law (and law reform) pertaining to sexual exploitation.

B. STRUCTURE OF SUBMISSIONS

- 9 Our submissions are structured as follows:

- 10 **D.1 The current state of the law in South Africa**

- What is prostitution?
- History of the law on prostitution in South Africa and the rest of the world
- The constitutional basis of current South African law and S v Jordan
- International law
- Foreign law

- D.2 Is there a need for law reform?**

- D.2.1 Policy considerations:**

- D.2.1.1 The harms of prostitution**

- D.2.1.2 Causes of the harms of prostitution**

- Pro-decriminalisation lobby groups’ representation of the issues
- SALRC’s analysis of the issues

- D.2.1.3 Conclusion: Causes of the harms of prostitution**

- D.2.2 Constitutional analysis: Rights affected by prostitution**

- S v Jordan

D.2.3 Conclusion: The extent to which law reform is required?

- Probable consequences of decriminalisation
- Criminalisation of the conduct of the prostitute

D.3 Law reform proposals

D.3.1 Full criminalisation (with diversion)

D.3.2 Partial criminalisation (prostitute not criminalised)

D.3.3 Socio-economic interventions and exit programs

D.3.4 Conclusion regarding proposals for law reform

D.4 Conclusion

C. INTRODUCTION

- 11 As introduction to our submissions, CFJ would like to state categorically that persons involved in the practice prostitution are not treated truly as human beings with intrinsic value in and of themselves. When prostituted, a person is solely or mainly used as an object for the sexual stimulation and gratification of another. The prostitute's sexuality is not protected or promoted in the context of human individuality, dignity and personhood. We submit that prostitution, by its very nature, involves a violation of human dignity and that the limitation of freedom to engage in prostitution and prostitution-related activities would on these grounds alone, be both reasonable and justifiable.
- 12 South Africa currently follows a regime of total criminalisation. Internationally a trend to address the demand side of prostitution by partial criminalisation (wherein the prostitute's actions are not criminalised) is gaining support. While this approach recognises that prostitution is inherently sexual exploitative, we have reservations whether this model would be successful in South Africa. An extremely well-researched and considered report of the SALRC shares these reservations on well-founded grounds and expresses a preference for full criminalisation, with effective exit/diversion programmes to empower women economically and socially.
- 13 Prostitution originates in desperate socio-economic circumstances which leave predominantly women with very few survival options. Furthermore, the practice of prostitution is inherently harmful, carries heightened risks of violence and is associated with trafficking and other criminal activities. We therefore favour the retention of the total criminalisation of prostitution with strong diversion programmes to assist vulnerable individuals to exit prostitution.

D. SUBMISSIONS

D.1 The current state of the law in South Africa

14 South Africa currently follows a regime of total criminalisation. Prostitution and prostitution-related activities (the keeping of brothels, the procurement of persons as prostitutes, soliciting by prostitutes, and living off the earnings of prostitution) are criminalised in terms of the Sexual Offences Act¹ and the Sexual Offences Amendment Act.² The conduct of all persons involved in prostitution (the prostitute, users of prostituted services and third parties such as brothel owners and pimps) are criminalised.³

What is prostitution?

15 The Oxford English Dictionary defines prostitution as “the practice or occupation of engaging in sexual activity with someone for payment”.⁴ Prostitute is defined as “a person, in particular a woman, who engages in sexual activity for payment” and “A person who misuses their talents or behaves unworthily for personal or financial gain”.⁵

16 The SALRC Report describes prostitution as “referring to the buying and selling of sexual acts and related activities”⁶ and a prostitute as “an adult person (older than 18 years) who voluntarily offers or provides sexual services for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not”.⁷ The SALRC Report definition of prostitute does not include any underage and/or coerced prostitute, or a person who has been trafficked for purposes of prostitution.

17 Prostitution and prostitution-related activities are criminalised in terms of the Sexual Offences Act⁸ and the Criminal Law (Sexual Offences and Related Matters) Amendment Act.⁹

18 The Sexual Offences Act criminalises (1) any person who keeps a brothel,¹⁰ (2) any person who procures or attempts to procure a female for the purposes of prostitution, for the purposes of becoming an inmate of a brothel, or drugs a female for the purposes of prostitution,¹¹ (3) any

¹ Sexual Offences Act 23 of 1957.

² Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 87.

⁴ Oxford English Dictionary Online *Definition of “Prostitution”* <https://en.oxforddictionaries.com/definition/prostitution>.

⁵ Oxford English Dictionary Online *Definition of “Prostitute”* <https://en.oxforddictionaries.com/definition/prostitute>.

⁶ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 45.

⁷ *Ibid* at 45.

⁸ Sexual Offences Act 23 of 1957.

⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Amendment Act”).

¹⁰ Section 2 of the Sexual Offences Act 23 of 1957.

¹¹ *Ibid* at Section 10.

person who assists another in engaging in prostitution,¹² (4) any person who permits prostitution to be committed on a premises owned or controlled by that person,¹³ (5) any person enticing and/or soliciting another to commit or committing immoral acts in public,¹⁴ and (6) any person living of the earnings of prostitution.¹⁵

19 Neither the Sexual Offences Act nor the Amendment Act however specifically defines prostitute or prostitution.

20 Section 20(1A) of the Sexual Offences Act criminalises prostitution – the acts of the prostitute. Section 20(1A) reads:

Any person 18 years or older who –

- (a) has unlawful carnal intercourse,¹⁶ or commits an act of indecency, with any other person for reward, or
 - (b) in public commits any act of indecency with another person,
- shall be guilty of an offence.

21 Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act reads:

A person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C') –

- (a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
 - (b) by committing a sexual act with B,
- is guilty of the offence of engaging the sexual services of a person 18 years or older.

22 The demand side of prostitution, accordingly is criminalised in terms of Section 11 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

23 We submit that any legal definition of prostitution cannot be divorced from the socio-economic circumstances from which prostitution originates or the harms it causes. Any description of prostitution should also be cognisant of its impersonal, promiscuous, commodifying and commercial nature. Prostitution can therefore conveniently be described as –

¹² Ibid at Section 12A.

¹³ Ibid at Section 17.

¹⁴ Ibid at Section 18.

¹⁵ Ibid at Section 20.

¹⁶ "unlawful carnal intercourse" is defined in section 1 of the same Act as 'carnal intercourse otherwise than between husband and wife'.

“the commodification of human sexuality for purposes of the commercial exploitation of the bodily expression of human sexuality through sexual acts.”

- 24 Since most prostituted persons are women and most users of prostituted services are men, for the sake of convenience and practically, these submissions will refer to prostitutes in female terms, and to users of prostituted services, in male terms.

History of the law on prostitution in South Africa and the rest of the world

- 25 The recorded history of European prostitution begins in the ancient Greco-Roman world. In ancient Greece there were four classes of prostitutes. While the highest class of prostitutes enjoyed considerable political influence, the lowest class of prostitutes were socially isolated and forfeited any rights that originated in citizenship. Even the children of these women were penalised by not being allowed to inherit property. Extensive legislation regulated the brothels which were state-owned and staffed by slaves. In ancient Rome, prostitutes were required to register at a magistrate’s office in order to obtain a licence. Unlicensed prostitutes were arrested, punished and evicted from the city.¹⁷
- 26 Prostitution was not outlawed in medieval Europe. It was seen as immoral, but also as a necessary evil that should be allowed in order for men to have access to women’s bodies for the purposes of men’s sexual gratification. Legal mechanisms did not seek to eradicate prostitution, but rather to control and contain it. Prostitution was tolerated, but stigmatised.¹⁸
- 27 Only during the Reformation did social policies change from tolerating prostitution to completely prohibiting prostitution by criminal sanction.¹⁹
- 28 In South Africa, prostitution was criminalised in 1988 when Parliament amended the Immorality Act and renamed it the Sexual Offences Act.²⁰
- 29 Prior to 1998, “while it was considered necessary to prohibit certain aspects and manifestations of prostitution in the public interest it was deemed neither necessary nor appropriate to prohibit the occupation of the prostitute. Accordingly, engaging in sexual intercourse in order to receive a material or pecuniary reward was not prohibited by penal sanction.”²¹ While prostitution narrowly defined, was not criminalised under either the common or statutory law, various activities

¹⁷ SALRC Discussion Paper *Project 107 Sexual Offences Adult Prostitution* (2009) at 110 and 111.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Sexual Offences Act 23 of 1957.

²¹ J Burchel and J Milton *Principles of Criminal Law 2* ed (1997) 629 and 630.

associated with prostitution were criminalised, including soliciting, living off the earnings of prostitution and keeping a brothel.²²

The constitutional basis of current South African law and S v Jordan

- 30 In *S v Jordan*,²³ the Constitutional Court confirmed the constitutional validity of section 20(1)(aA) of the Sexual Offences Act.²⁴ The constitutional validity of the section was challenged on the bases of the right to human dignity (gender discrimination), the right to privacy, the right to freedom and security of the person, and the right to economic activity.
- 31 With regard to the right to human dignity (alleged gender discrimination), the Court held that section 20(1A)(a) does not discriminate either directly women or indirectly against prostitutes by only criminalising the conduct of prostitutes, as the term prostitute is gender neutral and the purpose of the section is to criminalise commercial sex and not to protect the users of prostituted services.
- 32 The Court held that section 20(1A)(a) is a constitutionally reasonable and justifiable limitation of the right to privacy, the right to freedom and security of the person, and the right to economic activity.
- 33 The Court found in respect of the right to privacy that a person cannot appeal to the protection of the right to privacy in order to commit a crime in private and avoid criminal punishment for that crime. Furthermore, prostitutes solicit users of their services to engage in the crime of prostitution in private. Crimes committed in private are not less criminal in nature or less serious than crimes committed in public.
- 34 In respect of freedom and security of the person, the Court found that the prostitute makes herself liable for arrest and imprisonment by engaging in prostitution and is therefore able to avoid arrest and imprisonment by not engaging in prostitution. If the criminalisation of voluntary adult prostitution is constitutionally valid, being arrested and imprisoned for engaging in the crime of prostitution is a reasonable and justifiable limitation of a prostitute's right to freedom and security of the person.
- 35 Forced prostitution and/or trafficking are not criminal offences. A person will not be prosecuted as a criminal if they have been *forced* to engage in prostitution and/or have been trafficked. The law regards such a person as a victim of a sexual crime and not a perpetrator of a sexual crime.

²² S Pudifin and S Bosch "Demographic and Social Factors influencing Public Opinion on Prostitution: an Exploratory Study in Kwazulu-Natal Province South Africa" *PER* (2012) at 6.

²³ *S v Jordan* 2002 (6) SA 642 (CC).

²⁴ Section 20(1)(aA) has since been deleted but has been replaced by an identical provision contained in section 20(1A)(a).

- 36 The state argued that the purpose of the Sexual Offences Act is to promote the protection or the improvement of the quality of life and human development. This purpose is sanctioned by section 26 of the interim Constitution. Prostitution is known to be associated with violence, substance abuse, trafficking and other criminal activities and accordingly, its legal prohibition is reasonable and justifiable.
- 37 The Constitutional Court's judgment in *S v Jordan* is strong confirmation that the criminalisation of prostitution and prostitution-related activities is constitutionally valid under South African law. We return to the discuss the reasoning of the Court later herein when considering the need for law reform.

International law

- 38 South Africa has ratified two significant United Nations conventions which relate to prostitution. When a country ratifies a convention, it engages in an international act whereby it indicates its consent to be legally bound by that convention.
- 38.1 South Africa is a signatory to the UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others²⁵. South Africa ratified the convention on 10 October 1951. In its preamble, the convention stipulates that ***“prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community”***.
- 39 South Africa is also a signatory of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁶ South Africa ratified the convention on 15 December 1995. In Article 6 thereof, the convention stipulates that ***state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.***
- 40 South Africa is a state party to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime²⁷ (the Palermo Protocol), which declares in its preamble that state parties thereto agree to ensure that “effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such

²⁵ UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

²⁶ UN Convention on the Elimination of All Forms of Discrimination against Women (1979).

²⁷ UN United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000).

trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights”.

- 41 Article 3(a) of the Palermo Protocol defines trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.²⁸
- 42 According to Waltman²⁹, “most people who are in prostitution are subject to the treatment contained in the Palermo Protocol” since the definition of trafficking in the Protocol “in reality describes pimping as commonly conducted”. Therefore, prostitution generally is considered a form of trafficking by the United Nations as recognised by the United Nations Special Rapporteur on Trafficking.³⁰
- 43 Waltman states that “for the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person's experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity and poverty. Put simply, the road to prostitution [...] is rarely one marked by empowerment or adequate options.”³¹
- 44 As is clear from the abovementioned, South Africa is bound by international law to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women and South Africa has also legally acknowledged that it considers prostitution incompatible with the dignity and worth of the human person and that it endangers the welfare of the individual, the family and the community. The significance and importance hereof is profound.

²⁸ Article 3(a) of the UN *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (2000).

²⁹ M Waltman “Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law” *Michigan Journal of International Law* (2011) at 134.

³⁰ *Ibid.*

³¹ *Ibid.*

Foreign law

- 45 Below we briefly summarise the legislative and policy approaches to prostitution in a selection of foreign jurisdictions. Approaches to prostitution range from legalisation with or without regulation, to partial criminalisation (where the buyers of prostituted services and third parties involved in the selling of prostituted services are criminalised, but not the prostitutes themselves), to full criminalisation.
- 46 In general, there has been a trend towards viewing prostitutes as the victims of sexual exploitation.

United States of America

- 46.1 The United States of America (USA) has a federal system of government, which means that states may adopt different policies and laws about certain matters, like prostitution. Generally, in the United States of America (USA) follows the criminalisation model³² and consequently the offering and/or purchasing of prostituted services and related activities are illegal and subject to criminal sanction. The state of Nevada is a notable exception, as brothels may be legally operated in designated areas.³³
- 46.2 The USA is increasingly adopting a strategy of suppressing the demand for prostituted services. Prostitutes are treated as victims rather than criminals and the degree to which they can be prosecuted is limited. Instead, law enforcement targets the purchasers of prostituted services.³⁴

Canada

- 47 Canada follows a regime of partial criminalisation.³⁵ Recently the constitutionality of three provisions of the Canadian Criminal Code was successfully challenged in the Supreme Court of Canada.³⁶ The three provisions prohibited the operation of common bawdy-houses³⁷, living on the income of prostitution, and communicating for the purpose of prostitution in public. The Court held that it did not make a ruling on whether prostitution should be legal or not, only on whether the challenged provisions were constitutionally sound. The Court further held that the Canadian

³² SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 95.

³³ A Chauhan "How do Prostitution Laws differ around the World?" (10/11/2017) <http://www.advocatemail.com/legal-articles/3190-how-do-prostitution-laws-differ-around-the-world.html>

³⁴ R Garfinkel. "A New Twist on World's Oldest Profession: Nab the Johns, not the Prostitutes" (13/03/2017) <https://www.washingtontimes.com/news/2017/mar/13/working-women-prostitution-law/>

³⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 104.

³⁶ *Canada (Attorney General) v Bedford* 2013 SCC 72.

³⁷ Brothels, including a prostitute's own home.

legislature was not precluded from imposing limits on where and how prostitution may be conducted as long as the rights of prostitutes were not infringed.

- 48 Prostitution is seen as a form of exploitation and prostitutes as victims rather than criminals.³⁸ In response to the Supreme Court decision, the Canadian legislature amended the Canadian Criminal Code by enacting the Protection of Communities and Exploited Persons Act. The Act effectively criminalises the demand side and commercial exploitation of prostitution by inter alia prohibiting the purchasing of sex, operating brothels and pimping, and advertising sexual services.³⁹

United Kingdom

- 49 In England and Wales, the offering and purchasing of prostituted services are legal, but many prostitution-related activities are illegal and criminalised. Illegal activities relate to the exploitation of a prostitute which include controlling prostitution, managing a brothel, and activities that can be public nuisance, like soliciting sex in public.⁴⁰ While purchasing sex is not illegal per se, the Sexual Offences Act of 2003 (as amended by the Policing and Crime Act of 2009) prohibits the soliciting a person in a street or public place for the purpose of obtaining sexual services from a prostitute.⁴¹ The approach in the United Kingdom is therefore to address and limit the demand for prostitution.

- 50 Northern Ireland follows a regime of partial criminalisation. It is legal to sell sex and to solicit in public. It is illegal to purchase sex, to keep a brothel or control prostitution for profit.⁴² The prohibiting on the purchase of sex is currently being challenged in Court.⁴³

- 51 In Scotland selling sexual services is not illegal, but activities associated with prostitution is illegal, such as soliciting, kerb-crawling, and brothel keeping.⁴⁴

Australia

- 52 Australia is a federal system and each state may decide its own prostitution regime. In Queensland, New South Wales, the Australian Capital Territory, and Victoria, prostitution is legal

³⁸ A MacIvor "How Changes to Prostitution Laws shifted the Way Police tackle the Issue" (16/0/2017)

<http://www.cbc.ca/news/canada/nova-scotia/nova-scotia-prostitution-law-human-trafficking-police-1.4162524>

³⁹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 108.

⁴⁰ House of Commons Home Affairs Committee Report *Prostitution* (Third Report of Session 2016-17) (July 2016)

⁴¹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 100.

⁴² Government of North Ireland "Paying or Sexual Services" (undated) <https://www.nidirect.gov.uk/articles/paying-sexual-services>

⁴³ Z Tabary "Sex worker to challenge Northern Ireland prostitution law" (05/02/2017) <https://www.smh.com.au/world/sex-worker-to-challenge-northern-ireland-prostitution-law-20170205-gu5r44.html>

⁴⁴ SCOT-PEP "The Law – Outdoors" (undated) <http://www.scot-pep.org.uk/sex-workers-toolkit/law/law-outdoors>

and regulated. In Western Australia, the Northern Territory, Southern Australia and Tasmania, independent prostitution is legal and unregulated, but brothels are illegal.

- 53 For example, in the state of Victoria, prostitution is regulated by the Prostitution Control Act 102 of 1994, which legalises indoor prostitution while street prostitution and commercial sex (in massage parlours and flats) remain illegal. The purpose of the Act is to regulate prostitution in Victoria. The Act imposes substantial penalties for illegal activities and provides onerous regulations for legal operations. While the Act sought to regulate prostitution and improve the health and safety of prostitute's, it has instead caused the emergence of a two-tier system of a legal operations and illegal operations with circumstances in the illegal sector remaining dire.⁴⁵ In Queensland, where a similar trend has emerged, an estimated 90% of brothels are illegal.⁴⁶

New Zealand

- 54 Prostitution was decriminalised in New Zealand in 2003 under the Prostitution Reform Act.⁴⁷ It is legal to sell sexual services, keep a brothel, live of the proceeds of someone else's prostitution, and soliciting on the street.⁴⁸ Prostitution is further regulated by generic employment, and health and safety laws as well as prostitution specific laws that prohibit the exploitation of prostitutes.⁴⁹ For example, prostitutes have the right to refuse to have sex with a client even if the client has paid, and cannot be fined for refusing the client, while purchasers may refer contested contracts to a dispute tribunal.⁵⁰

The Netherlands

- 55 The Netherlands follow a non-criminalised regulated model.⁵¹ Prostitution, including brothel-keeping, is legal and regulated by the imposition of municipal regulations on the location, organisation and the practice of prostitution. Once all regulatory requirements have been fulfilled, a licence to sell sex may be obtained from the municipal office.⁵²
- 56 While the Netherlands, particularly Amsterdam, is well known for its sex tourism industry, recently the Dutch government has begun considering reintroducing stricter prostitution-related laws due to the link between prostitution and criminal activity.⁵³ After the legalising of prostitution in the

⁴⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 111.

⁴⁶ *Ibid.*

⁴⁷ Kelly L at al *Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries* (2009) at 26 and 27.

⁴⁸ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 108.

⁴⁹ *Ibid* at 109.

⁵⁰ *Ibid.*

⁵¹ *Ibid* at 114.

⁵² *Ibid* at 115.

⁵³ *Ibid* at 116.

Netherlands, organised crime spiralled out of control and women in prostitution were no safer than when prostitution was illegal.⁵⁴ The Dutch legislature also recognised and emphasised that prostitution is not work like any other, since a prostitute cannot be held to an employment contract which forces the prostitute to engage in sexual services without violating the most fundamental humans rights like safety and security of the person.⁵⁵

Germany

57 In Germany, prostitution is legal, but regulated.⁵⁶ The Prostitutionsgesetz (Prostitution Act) of 2001 imposes zoning restrictions and requires the registration of brothels, while the advertising of sexual services remains prohibited in terms of administrative laws.⁵⁷ Prostitution is regarded by law as any other form of labour. Prostitutes enjoy labour rights and are required to pay taxes. But treating prostitution as any other normal profession has led to some absurd results.⁵⁸

58 A German woman, who is trained as an IT professional, was seeking employment and registered at an employment agency. In her application, she indicated her willingness to attend interviews for positions falling outside of the IT sector. She received an invitation for an interview at a bar, but realised that it was a position that required her selling her body for sex. She declined the interview. Because prostitution is seen as a normal profession under German law, she was seen as turning down an offer of employment. Under German law, if a job seeker turns down a legal offer of employment, that job seeker may lose their unemployment benefits. Therefore, under German law women can be forced to choose between working as a prostitute or losing their unemployment benefits. This is both an absurd and shocking situation, and one to take heed of as “you *may* be a prostitute” can easily digress to “you *shall* be a prostitute”.

Sweden

59 Sweden has partially decriminalised prostitution.⁵⁹ The users of prostituted services, pimps and brothels remain criminalised, but not the prostitutes themselves. This is the known as the Nordic

⁵⁴ M Farley “Very inconvenient Truths: Sex Buyers, Sexual Coercion, and Prostitution-Harm-Denial” (2017) <http://logosjournal.com/2016/farley-2/>

⁵⁵ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 116.

⁵⁶ A Chauhan “How do Prostitution Laws differ around the World?” (10/11/2017) <http://www.advocatemail.com/legal-articles/3190-how-do-prostitution-laws-differ-around-the-world.html>

⁵⁷ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 113.

⁵⁸ C Chapman “If you don’t take a job as a prostitute, we can stop your benefits” (30/01/2005) <http://www.telegraph.co.uk/news/worldnews/europe/germany/1482371/If-you-dont-take-a-job-as-a-prostitute-we-can-stop-your-benefits.html>

⁵⁹ Swedish Government Report *SOU 2010:49 The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (2010)

Model and it has gained considerable support worldwide.⁶⁰ This model has enjoyed considerable success and has resulted in significant reductions in street prostitution and sex trafficking.⁶¹

60 The Nordic Model considers the selling of a person's body for the sexual gratification of another to be inherently exploitative and not compatible with human dignity. It sees prostitutes as victims of exploitation and therefore seeks to eradicate prostitution by addressing the demand for prostituted services.⁶²

D.2 Is there a need for law reform?

61 The fundamental question that needs to be answered, is whether law reform is at all necessary. In order to answer this question, we need to critically assess both the nature and effect of prostitution, prostitution-related activities and how current South African prostitution laws fits within the matrix of constitutional rights, values, obligations and the interests that undergird them. In this regard, the most important constitutional rights are the right to (1) equality, (2) human dignity, (3) freedom and security of the person, (4) privacy, (5) freedom of trade, occupation or profession, and (6) health care, food, water and social security.

61.1 We will examine the impact that prostitution, prostitution-related activities and current South African prostitution laws have on these fundamental rights to formulate a reasoned and authoritative opinion on whether legislative reform is at all necessary. Furthermore, we will consider whether prostitution and prostitution-related activities respect, protect, promote and fulfil any of these fundamental rights or are prejudicial to the proper use and enjoyment of these rights.

61.2 A related consideration is whether prostitution is a desirable practice at all. If, for argument's sake, the inherent nature of prostitution is that it is harmful, to the individuals engaged therein and/or to society generally, for the good and benefit of all prostitution should then not be protected but rather discouraged through all available means. In such circumstances, the appropriate legislative response would be to recognise its harms by prohibiting the practice thereof.

61.3 A further significant consideration is whether the harms of prostitution will best be addressed and solved by a legislative response, a socio-economic response or a combination of both. We will argue that the practice of prostitution is primarily socio-economic in origin and that any legislative

⁶⁰ M Goldberg "Swedish prostitution law is spreading worldwide – here's how to improve it" (08/08/2014)

<https://www.theguardian.com/commentisfree/2014/aug/08/criminalise-buying-not-selling-sex>

⁶¹ Z Aleem "16 Years Since Decriminalizing Prostitution, Here's What's Happening in Sweden" (13/03/2015)

<https://mic.com/articles/112814/here-s-what-s-happened-in-sweden-16-years-since-decriminalizing-prostitution#.5ZvXZU1cw>

⁶² Swedish Government Report SOU 2010:49 *The Ban against the Purchase of Sexual Services. An evaluation 1999-2008* (2010)

response to prostitution is at best reactionary. Prostitution will only be eradicated if the socio-economic circumstances that give rise thereto are addressed and solved.

62 In essence, law reform will be necessary (1) if the law on prostitution (as it stands) is unconstitutional and/or (2) if there are policy considerations that militate so strongly in favour of reform that a change in the law must be effected.

63 In this regard, the position of the SALRC offers significant guidance. The Commission conducted a thorough and laborious research project into the subject of prostitution, recognising that the origin of prostitution is found in desperately disadvantaged socio-economic circumstances.

D.2.1 Policy considerations:

D.2.1.1 The harms of prostitution

64 Authoritative research has concluded that prostitution is inherently exploitative⁶³ in nature and closely associated with harms such as extreme physical violence and psychological trauma.⁶⁴ Prostitutes suffer intense and continuous physiological and psychological harms in their own bodies.⁶⁵

65 Physical harms include severely health consequences, including HIV/AIDS and STDs.⁶⁶ Prostitutes are often assaulted and raped⁶⁷ and the murder rate amongst women in prostitution is significantly higher than amongst other groups.⁶⁸

66 Prostitution is also closely associated with substance abuse and other criminal activities.⁶⁹ Prostitution is directly associated with human trafficking.⁷⁰

67 Prostitution is predominantly caused by desperate socio-economic circumstances, that deprave women of viable alternative survival options, and the effect of prostitution is that it keeps women trapped in these circumstances by further socially isolating and economically marginalising

⁶³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 204, 218 and 225.

⁶⁴ National Center on Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

⁶⁵ M Farley "Bad for the Body, Bad for the Heart": Prostitution Harms Women Even if Legalized or Decriminalized" *Violence Against Women* at (October 2004) at 1106.

⁶⁶ *Ibid* at 1097 and 1098.

⁶⁷ M Farley "Prostitution, Violence, and Posttraumatic Stress Disorder" *Women & Health* (1998) at 40 and 41.

⁶⁸ M Farley "Bad for the Body, Bad for the Heart": Prostitution Harms Women Even if Legalized or Decriminalized" *Violence Against Women* at (October 2004) at 1097.

⁶⁹ National Center on Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

⁷⁰ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 70.

them.⁷¹ The socio-economic marginalisation that women in prostitution are subjected to is a form of subtle and indirect coercion that in a way forces them to consent to a lifestyle of prostitution if only in order to survive.⁷²

- 68 It is common cause that women in prostitution are also isolated by social stigma and often suffer discriminatory treatment by law enforcement officers and health care personal.⁷³ This leads to prostitutes' human rights being violated by law enforcement officials.
- 69 Prostitution is also closely associated with gender-based violence⁷⁴ and is intrinsically linked to racism, sexism, class prejudice.⁷⁵
- 70 The Constitutional Court addressed the issue of adult prostitution comprehensively in *S v Jordan*.⁷⁶ The State referred to several harms of prostitution.⁷⁷ These harms include that prostitution (1) is in itself (in other words inherently) degrading to women, (2) is conducive to violent abuse of prostitutes both by customers and pimps, (3) is associated with and encourages the international trafficking in women, which South Africa is obliged by its international law commitments to suppress, (4) leads to child prostitution, (5) carries an intensified risk of the spread of sexually transmitted diseases, especially HIV/AIDS, (6) goes hand in hand with high degrees of drug abuse, (7) has close connections with other crimes such as assault, rape and even murder, and (8) is a frequent and persistent cause of public nuisance.
- 71 The National Center on Sexual Exploitation (NCOSE)⁷⁸ and Dr Melissa Farley⁷⁹ have conducted extensive research on the harms of prostitution.
- 72 They have identified the harms of prostitution to include (1) an extremely high risk of experiencing physical violence and psychological trauma, (2) intrinsic racism, sexism and class prejudice, (3) indirect sexual coercion for especially the economically marginalised and vulnerable, (4) close association with sex trafficking, and (4) association with substance abuse and other criminal activities.

⁷¹ Ibid at 63.

⁷² Ibid.

⁷³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 208.

⁷⁴ National Center on Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

⁷⁵ M Farley "Very inconvenient Truths: Sex Buyers, Sexual Coercion, and Prostitution-Harm-Denial" (2017) <http://logosjournal.com/2016/farley-2/> at 117.

⁷⁶ *S v Jordan* 2002 (6) SA 642 (CC).

⁷⁷ Ibid at para [86].

⁷⁸ National Center on the Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

⁷⁹ M Farley "Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly" *Yale Journal of Law & Feminism* (2006).

73 It is well documented that most if not all prostitutes will experience physical or sexual violence and research has found that most women in prostitution has symptoms of post-traumatic stress disorder.⁸⁰

D.2.2 Causes of the harms of prostitution

Pro-decriminalisation lobby groups' representation of the issues

74 Some lobby groups and organisations argue that decriminalising of prostitution will “reduce harm, abuse and exploitation by bringing prostitution practices into the mainstream”.⁸¹ These groups further argue that decriminalising prostitution will allow prostitutes to have access to rights, including labour-related rights, and enable them to have their rights enforced against the police, community and “employers”. According to this perspective, prostitution should be legal, regulated and monitored. As long as prostitution is criminalised, these groups argue, prostitutes are denied basic rights and suffer harm.

75 Yet, as will be shown below, it is the act of prostitution itself that carries the risk of harm to the prostitute and that it cannot be considered work. What prostitutes necessarily experience on a daily basis would be considered sexual harassment, exploitation and dangerous working conditions in any real form of employment.

76 The Sex Workers Education and Advocacy Taskforce (SWEAT) argues that when prostitution is legalised, the relationship between prostitutes and the police, the state and society will improve and prostitutes will be granted the same rights as other ordinary citizens.⁸² According to SWEAT, harms associated with prostitution are primarily caused by the laws that criminalise prostitution.

77 According to SWEAT the criminalising of prostitution (1) adversely affects women’s ability to earn an income from a practice with a long history of existence, (2) is based on out-dated and patriarchal laws, reflecting repressive ideas on sexuality, relationships, who owns women’s bodies, and the position of women in society, (3) violates prostitutes’ rights (4) does not address violence against women as it does not recognise prostitution as viable work, (5) increases women’s vulnerability to HIV/AIDS, (6) reduces women’s power to negotiate safer sex, (7) limits their access to HIV education, condoms and treatment, and (8) increases their risk for violence and rape.⁸³

⁸⁰ M Farley “Prostitution is Sexual Violence” (01/10/2004) <http://www.psychiatrictimes.com/sexual-offenses/prostitution-sexual-violence>

⁸¹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 118.

⁸² *Ibid.*

⁸³ *Ibid* at 35.

- 78 Again, as will be shown below, legalising prostitution will not eradicate the harms of prostitution, but only legalise and ironically validate the very source of the harm itself. Furthermore, as will be discussed below, the Constitutional Court found that criminalising prostitution does not unreasonably or unjustly infringe any constitutional rights.
- 79 As to the argument that the harms of prostitution will be minimised and/or eliminated if prostitution was legally recognised as a legitimate form of work, the SALRC stated in its report that neither the International Labour Organisation nor South African public policy supports the notion of prostitution as work,⁸⁴ that a study of nine countries found that *no attempts* to transform prostitution into a legally regulated type of employment have been successful (as no other profession requires an individual to use their own body and sexual intimacy in a similar way).⁸⁵ Furthermore, the Constitutional Court found in *S v Jordan* that there are no examples in either international law or domestic constitutional law that has been used successfully in any country to challenge laws penalising prostitution on the grounds that such laws violate rights of autonomy or rights to pursue a livelihood.⁸⁶
- 80 People Opposed to Women Abuse (POWA) argues that criminalising prostitution makes women vulnerable to violence, discriminates against women and facilitates the conditions under which women prostitutes continue to be harassed and physically or sexually abused by pimps, brothel owners, clients and the police.⁸⁷ POWA argues that decriminalising prostitution will make prostitutes less vulnerable to violence.⁸⁸
- 81 Again, we will show below that the violence and abuse associated with prostitution is not created by legislation, but originates in the act and nature of prostitution itself.
- 82 Furthermore, the necessary laws to protect women against sexual abuse and violence are already in place in South Africa. It is common cause that physical and sexual abuse and violence are criminal offences. These acts are criminalised under South African Law, which means that the status of South African law is not the problem. It is the behaviour of certain South Africans and/or people within South Africa's borders that are the problem. Part of the problem is that the laws that are already in place are violated and thereafter not enforced.
- 83 Ultimately, *criminalising* prostitution does not make women vulnerable to violence. *Prostitution* makes women vulnerable to violence. Anti-prostitution laws are necessary, forming part of the range of measures available to society in seeking to curtail and mitigate the harms of prostitution.

⁸⁴ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 200.

⁸⁵ Kelly L at al *Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries* (2009) at 40.

⁸⁶ *S v Jordan* 2002 (6) SA 642 (CC) at para [93].

⁸⁷ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 119.

⁸⁸ *Ibid.*

These harms are not created by the anti-prostitution laws. Anti-prostitution laws seek to address the harms that were already caused by prostitution and to prevent further harms from being caused by prostitution.

- 84 Sonke Gender Justice argues that decriminalising prostitution will make prostitution and prostitutes safe, reduce gender-based violence and improve public health.⁸⁹ Current South African prostitution laws do not prevent prostitutes from obtaining health care. If health care workers discriminate against prostitutes, education programs to sensitise health care workers are necessary.
- 85 Prostitution laws do not cause gender-based violence or make prostitutes and prostitution unsafe. These harms associated with prostitution are inherent to prostitution and will exist wherever prostitution is practiced, irrespective of the legislative prostitution regime in place.
- 86 Similar to SWEAT, POWA and Sonke Gender Justice, the Asijiki Coalition (of which SWEAT is the founding member) argues that the criminalisation of prostitution violates the human rights of prostitutes. As we will show hereinbelow, prostitution itself is the human rights violation and criminalising prostitution recognises this fact whereas legalising prostitution chooses to turn a blind eye to the human rights violations of prostitution. Legalising prostitution will in no way change the inherent nature thereof and it will remain a human rights violation, albeit a legally endorsed human rights violation.

SALRC's analysis of the issues

Introduction

- 87 The SALRC found that prostitution is inherently exploitative in nature and characterised by dominance and violence.⁹⁰ The Report finds that prostitution is not work in any conventional sense of the word; it is a survival strategy.⁹¹
- 88 Indeed, the Report recognises the inherently exploitative nature of prostitution and recommends that "prostitution should not be recognised as a reasonable means to secure a person's living in South Africa, and from a formal labour perspective should not be considered to be work or decent work."⁹² This is a significant conclusion since, as seen above, the legal acceptance of 'prostitution as work' is a major objective of those who contend for the legalising of prostitution and argue that

⁸⁹ Sonke Gender Justice "Decriminalisation of Sex Work" (undated) <http://genderjustice.org.za/project/policy-development-advocacy/decriminalisation-sex-work/>

⁹⁰ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 204, 218 and 225.

⁹¹ *Ibid* at xxix and 63.

⁹² *Ibid* at xviii.

the decriminalisation of prostitution will address and remove the harms associated with the practice thereof.

- 89 The Report states that the objective should be to create opportunities for decent and productive work that will contribute to the reduction of inequality and poverty.⁹³ The developmental challenges of inequality and poverty are known causes of prostitution. Legalising prostitution cannot be promoted as a solution to poverty since prostitution is not “an employment option for poor or marginalised people”.⁹⁴
- 90 It is therefore crucially important to recognise that ultimately legalising prostitution will not benefit either prostitutes or society, but instead ignore the socio-economic and physiological origins of prostitution and exacerbate its harms. While most women in prostitution would exit it if it was economically viable for them to do so,⁹⁵ very few women escape prostitution by means of prostitution.⁹⁶ In other words, as already shown above, most women enter prostitution due to a lack of viable alternative economic survival options. Women however, do not make enough money through prostitution to be able to exit prostitution. Therefore, we conclude that prostitution is often a vicious cycle that entraps women once they enter it and prevents them from leaving it even if they want to because they have almost no other means of survival. Only by providing women with adequate socio-economic support, will they be able to exit prostitution.
- 91 The SALRC as well as other researchers⁹⁷ and organisations⁹⁸ that focus on prostitution specifically and the sexual exploitation of women generally, have concluded that the legalising of prostitution will not address the harms of prostitution since the harms of prostitution are inherently rooted in the activity of prostitution itself. This is a view we support based on the authoritative sources it is based on – research findings and first-person accounts of lived experiences of prostitutes.

The SALRC Report – Discussion

- 92 The SALRC has found that prostitution is inherently exploitative.⁹⁹ The SALRC came to this conclusion after a thorough process of investigation, public participation, consideration of research and law on a global scale and proper application of all its observations to the South African context. Findings based on such extensive work by a specialist body designed and mandated to make recommendations to government should only be departed from in the most

⁹³ Ibid.

⁹⁴ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xviii.

⁹⁵ M Farley “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” *Violence Against Women* (October 2004) at 1095.

⁹⁶ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xvii and xviii.

⁹⁷ Melissa Farley.

⁹⁸ National Center on the Sexual Exploitation.

⁹⁹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 204, 218 and 225.

exceptional of circumstances, for example if it could conclusively be proved that to follow the recommendations would result in grave injustice.

93 In this regard, the Report supports the Constitutional Court's pronouncements on the nature and effect of prostitution is instructive, as it is the final arbiter on all matters of constitutional import.

94 In *S v Jordan*, the court held that:

“Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.”¹⁰⁰

95 From the perspective of exploitation, women are essentially coerced into a life of prostitution due to economic marginalisation, educational deprivation, job shortages and gender discrimination.¹⁰¹ These socio-economic conditions make women particularly vulnerable for recruitment into a life of prostitution.

96 The Report states that economic marginalisation can be seen as a form of subtle or indirect coercion. This means that even where a woman seems to voluntarily choose to enter prostitution, since she is making a choice between prostitution as a form of income over a life of absolute poverty, her choice is not really a voluntary choice. Her desperate circumstances, limited choices and vulnerability essentially force her into prostitution.¹⁰²

97 From this perspective, decriminalising prostitution will only add insult to injury. Already the desperate socio-economic circumstances that give rise to prostitution are not being adequately addressed. From the above we conclude that prostitution is a symptom of an underlying cause:

¹⁰⁰ *S v Jordan* 2002 (6) SA 642 (CC) at para [74].

¹⁰¹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 204.

¹⁰² *Ibid* at 225.

a severe lack of choices.¹⁰³ No young girl walks around with the dream in her heart to one day be a prostitute. It is ultimately the lot of those without choices.

- 98 Similarly, desperate socio-economic circumstances cause other criminal activities. It would be absurd to suggest for example, that petty thievery and drug dealing should be legalised. At least a drug dealer has the option of not using the drugs that he sells and not experiencing the physiological harms thereof in his body. A prostitute does not even have this option as she experiences the physiological and psychological harms of prostitution in and through her body.
- 99 The Report states that an empirical study of 150 countries found that countries in which prostitution is legalised, has significantly higher instances of human trafficking compared with countries in which prostitution is not legalised.¹⁰⁴ The Report notes that similar to other illegal markets like drugs, illegality does not eradicate the illegal market. In fact, it has been found that when prostitution is legalised and the practice becomes less socially condemned, the purchasers of sexual services and third parties like brothels and pimps, typically become more brazen in violent behaviour.¹⁰⁵ It seems that the social stigma attached to the purchasers of sexual services, keeps the already violent behaviour of the purchasers in check to some degree. When prostitution is legalised, the social check (conscience of exploitation) is removed.
- 100 The Report states that prostitution also involves gender-based violence.¹⁰⁶ Most prostitutes are women and most purchasers of sexual services are men. Historically, men have held more traditional positions of social and economic power than women. The prevalence of gender-based violence against women in South Africa is well documented. South Africa has recognised the special need to empower women socio-economically and protect them from gender-based violence, given past and current social realities. Legalising prostitution will frustrate this very laudable objective as it will entrench gender imbalances and its consequences (e.g. gender-based violence against women) and make it even more socially acceptable.
- 101 From this perspective (social acceptability), prostitution is not a private act, but a social statement about the status and worth of women in society. If it is socially acceptable and legally condoned that a human being can be reduced to a mere organ or orifice for used for the sexual gratification of another, society has a very low view of women.¹⁰⁷ Prostitution is degrading, humiliating and causes physical and psychological harm to nearly all women. Prostitution necessarily exposes

¹⁰³ Ibid at xvi.

¹⁰⁴ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 70.

¹⁰⁵ M Farley "The Real Harms of Prostitution" (19/10/2010)

https://www.mercatornet.com/articles/view/the_real_harms_of_prostitution/8143

¹⁰⁶ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at 73.

¹⁰⁷ M Farley "Very inconvenient Truths: Sex Buyers, Sexual Coercion, and Prostitution-Harm-Denial" (2017)

<http://logosjournal.com/2016/farley-2/>

women to violence (not *all* women, but the vast majority of them). Most prostitutes have been or will be physically abused and raped.¹⁰⁸

102 Due to the overwhelming evidence of the harms of prostitution, the SALRC Report does not favour the decriminalisation of prostitution. The Reports states that “it would be naïve to think that prostitution could be neatly excised from the above activities through non-criminalisation. Prostitution would continue to be shaped by the same socio-economic factors that concentrate crime in areas plagued by poverty, inequality and unemployment.”¹⁰⁹ The SALRC also finds that violence continues unabated when prostitution is legalised and expressed its concern that a shift away from criminalisation will increase child prostitution.¹¹⁰

D.2.1.3 Conclusion: Causes of the harms of prostitution

103 We conclude that the overwhelming evidence strongly suggests that the harms of prostitution is inherent in prostitution and these harms therefore originate in the act of prostitution itself. In other words, it is prostitution itself that causes the harms and therefore the only way to address and eradicate the harms of prostitution is to eradicate prostitution itself.

104 Whether prostitution is criminalised, regulated, or decriminalised, the harms of prostitution will exist wherever prostitution is practiced, irrespective of the legal regime in place. The threat that decriminalising prostitution poses is that it will cause a false sense that the harms of prostitution have properly been addressed, while in fact, the harms will continue as long as prostitution continues. Ultimately, this may lead to the plight of women in prostitution receiving even less attention than present.

105 Therefore, the only effective way to address the harms of prostitution, is to address the causes of prostitution. As seen above, the causes of the harms of prostitution are not laws, but desperate socio-economic circumstances that leave women with very few survival options.

106 Most prostitutes are women: a factor which provides an important insight into the gender inequalities that play an integral part in prostitution as phenomenon (that women are typically less economically empowered than men) and social ideologies (that it is acceptable role for women to be used as objects for the purpose of satisfying men’s sexual needs).¹¹¹ Prostitution is most prevalent under socio-economically marginalised and therefore vulnerable women. There is a

¹⁰⁸ National Center on the Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018) at 25.

¹⁰⁹ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xix and xx.

¹¹⁰ *Ibid* at xx.

¹¹¹ European Parliament Directorate General for Internal Policies *Study on Sexual Exploitation and Prostitution and its Impact on Gender Equality* (2014) at 19.

high prevalence of a history of sexual and physical abuse amongst prostituted women.¹¹² Women forced into prostitution due to lack of socio-economic choices are seen as and become a separate class of women who are perceived as less worthy women. Typically, traditionally disadvantaged women are more at risk for entering prostitution as they face more desperate socio-economic circumstances.¹¹³

- 107 Since most women in prostitution entered the practice as a survival strategy due to desperate socio-economic circumstances, whether these women truly consent to prostitution is highly questionable at best and statistically speaking, highly improbable. In this sense, prostitution is sexual coercion, albeit in some instances subtle and indirect. When someone has nothing left to make a living with – the produce of their hands or intellect (whether labour or goods) – they are forced to consider selling their last resort, their bodies or organs. At such point, choice and consent no longer play a role, as actions flow from circumstances that were void of options to begin with.
- 108 The link between prostitution and sex trafficking has also been well documented. Where there is an increase in the demand for prostitution, there is an increase in sex trafficking.¹¹⁴
- 109 Even countries that have legalised prostitution, such as the Netherlands, have recognised the correlation between prostitution and other criminal activities and are considering stricter prostitution laws as a result.¹¹⁵
- 110 The only way to end sexual abuse and violence against women in prostitution is to eradicate prostitution. Legalising prostitution does not reduce sexual abuse and violence, in fact research has found that it seems to embolden it.¹¹⁶
- 111 It is important to note that law can play a supportive and supplementary role in eradicating prostitution and addressing the causes. The law can recognise that prostitution is inherently harmful, criminally prohibit and sanction it as such and provide mechanisms and obligations for diversion programmes to assist women to successfully exit prostitution. The supportive role that the law can and should play in eradicating the harms of prostitution, will be undermined significantly if the law fails to recognise prostitution's harms by decriminalising it.

¹¹² The National Academies Press "Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States" (2013) <https://www.nap.edu/read/18358/chapter/6#80>

¹¹³ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xxii.

¹¹⁴ M Sullivan "What Happens when Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia" (2005) <http://www.feministes-radicales.org/wp-content/uploads/2012/03/Mary-Sullivan-CATW-What-Happens-When-Prostitution-Becomes-Work...-An-Update-on-Legalisation-of-Prostitution-in-Australia.pdf>

¹¹⁵ J Ouyshoorn "Policy Change in Prostitution in the Netherlands: from Legalization to Strict Control" (19/06/2012) < <https://link.springer.com/content/pdf/10.1007%2Fs13178-012-0088-z.pdf>

¹¹⁶ M Farley "The Real Harms of Prostitution" (19/10/2010) https://www.mercatornet.com/articles/view/the_real_harms_of_prostitution/8143

- 112 Instead of attempting to change legal regimes, the focus should be on actively improving the socio-economic circumstances of South African women. The extent of the socio-economic reforms required fall outside the scope of these submissions, but we submit that community-based partnerships should seek to provide education and employment opportunities, and social and financial support for vulnerable women. Government could provide infrastructure and support (through incentives etc.) for these decentralised community-based initiatives.
- 113 Since prostitution is closely linked to gender-based violence, racism, sexism and class prejudice, any socio-economic strategy should also focus on identifying, addressing and eradicating gender and other inequalities.
- 114 As stated above, the harms of prostitution are linked to the act of prostitution itself. When a woman sells her body, a part of her body or a body orifice, she sacrifices her personhood because she is used as an object or thing. She is reduced to her utility to address another's need for sexual gratification. South African law does not allow persons to be sold as objects (whether by others or by themselves) as that would be slavery and/or be contrary to the right to human dignity.
- 115 The violence associated with prostitution also originates in the objectification of prostituted women.¹¹⁷ Psychologically, when person purchases an object, that person is free to do with and treat that object as he wishes. The object may not protest and it has no feelings or rights.
- 116 Therefore, the only way to cure the harms of prostitution is to deal with the cause of the harm. The cause of the harm is the devaluing of human beings which is inherent in prostitution - the commodification and exploitation of women's bodies as objects for sexual gratification. Seen from this perspective, prostitution itself is the problem and the only way to effectively address harms is to eradicate prostitution.

D.2.2 Constitutional analysis: Rights affected by prostitution

- 117 The state must respect, protect, promote and fulfil the rights in the Bill of Rights.¹¹⁸ The fundamental rights implicated by prostitution are (1) the right to equality,¹¹⁹ (2) the right to human dignity,¹²⁰ (3) the right to freedom and security of the person,¹²¹ (4) the right to privacy,¹²² (5) the

¹¹⁷ M Farley *Comparing Sex Buyers with Men Who Don't Buy Sex* 2000.

¹¹⁸ Constitution of South Africa, 1996 Section 7(2).

¹¹⁹ *Ibid* at Section 9 and Section 8 of the interim Constitution, 1993.

¹²⁰ *Ibid* at Section 10 and Section 10 of the interim Constitution, 1993.

¹²¹ *Ibid* at Section 12 and Section 11 of the interim Constitution, 1993.

¹²² *Ibid* at Section 14 and Section 13 of the interim Constitution, 1993.

right to freedom of trade, occupation and profession,¹²³ and the right to health care, food, water and social security.¹²⁴

The right to equality¹²⁵

118 In *S v Jordan*, a majority of the Constitutional Court found that section 20(1)(aA)¹²⁶ of the Sexual Offences Act¹²⁷ did not directly infringe the right to equality of women on the basis of gender as the provision is gender neutral.¹²⁸ The Court further held that the prohibition does not indirectly discriminate against prostitutes by criminalising the prostitute and not the user of the prostituted services as the purpose of the prohibition is to criminalise commercial sex and not the prostitute per se.¹²⁹ It is not crime to be a prostitute, but it is a crime to sell sex for commercial purposes. The Court held that it is common practice to strike at the merchant of illegal transactions as the merchant is also likely to be a repeat offender.¹³⁰

The right to human dignity¹³¹

119 In *S v Jordan*, the Constitutional Court held that:

“Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.”¹³²

¹²³ Ibid at Section 22 and Section 23, ‘economic activity’, of the interim Constitution, 1993.

¹²⁴ Ibid at Section 27.

¹²⁵ Ibid at Section 9.

¹²⁶ Section 20(1)(aA) has since been deleted but has been replaced by an identical provision contained in section 20(1A)(a).

¹²⁷ Sexual Offences Act 23 of 1957.

¹²⁸ *S v Jordan* 2002 (6) SA 642 (CC) at para [9].

¹²⁹ Ibid at para [10].

¹³⁰ Ibid.

¹³¹ Section 10 of the Constitution of South Africa, 1996

¹³² *S v Jordan* 2002 (6) SA 642 (CC) at para [74].

- 120 The above is a definitive finding of the inherent degrading nature of prostitution and that prostitution itself should rightly be seen as a human rights violation. No legislative reform can or will change the inherent nature of prostitution, it will only tragically conceal the true nature of prostitution to the detriment of prostitutes themselves and society.
- 121 The Court further held that the law does not deny prostitutes the right to be treated with dignity and respect by law enforcement officials (when arrested and/or detained) or by users of prostituted services.¹³³

The right to freedom and security of the person¹³⁴

- 122 In *S v Jordan* the Constitutional Court held that the prostitute makes herself liable for arrest and imprisonment by violating the law.¹³⁵ The fundamental question is whether the law that she violates is constitutional. If the law is constitutional, which it was found to be, invasion of the prostitute's freedom and personal security is a result of her violation of the law and not any infringement of her rights by the state.¹³⁶
- 123 Since the law criminalising prostitution is constitutionally valid, a prostitute caught violating the law is not detained for an unjust cause and in any event exposes herself to being detained by violating the law. The prohibition against prostitution serves legitimate public interests. Similarly, the prohibition against prostitution does not infringe prostitutes' right to bodily integrity. Farley comments on how prostitutes dissociated¹³⁷ from themselves as a survival coping mechanism in order to deal with the physical and mental trauma of prostitution.¹³⁸

The right to privacy¹³⁹

- 124 The prohibition against prostitution does not intrude into the sphere of private intimacy and autonomy which allows human beings to establish and nurture human relationships without interference from the outside community, and it also does not affect the sexuality of the prostitute at the core of the area of private intimacy.¹⁴⁰ Prostitution is not an intimate private relationship,

¹³³ *S v Jordan* 2002 (6) SA 642 (CC) at para [74].

¹³⁴ Section 12 of the Constitution of South Africa, 1996

¹³⁵ *S v Jordan* 2002 (6) SA 642 (CC) at para [75].

¹³⁶ *Ibid.*

¹³⁷ According to the American Psychiatric Association, dissociation, which exists on a continuum from mild to severe, refers to persons' experience of disconnection from their own mind and body. Dissociation has a negative impact on memory, identity, emotion, perception, behaviour and sense of self and its symptoms can potentially disrupt every area of mental functioning. Dissociation is associated with trauma because it helps a person tolerate what might otherwise be too difficult to bear. <https://www.psychiatry.org/patients-families/dissociative-disorders/what-are-dissociative-disorders>

¹³⁸ M Farley "Bad for the Body, Bad for the Heart": Prostitution Harms Women Even if Legalized or Decriminalized" *Violence Against Women* at (October 2004) at 1107 to 1109.

¹³⁹ Section 14 of the Constitution of South Africa, 1996

¹⁴⁰ *S v Jordan* 2002 (6) SA 642 (CC) at para [27].

but impersonal commercial sex transactions with strangers. Prostitution is not an intimate association¹⁴¹ and the prohibition thereof does not affect the dignity of prostitutes (or buyers of their services).¹⁴²

125 The Court further held that a person who commits a crime in private, the nature of which can only be committed in private, can not necessarily claim the protection of the privacy clause as the law should be as concerned with crimes that are committed in private as it is with crimes that are committed in public.¹⁴³ The Court held that the commercial interests of the prostitute is limited and that they are free to any other commercial interests that do not involve the sale of sex.¹⁴⁴

126 Finally, even if the right to privacy is implicated, the Court held that it lies at the periphery and not at its inner core as the prohibition is not directed at limiting privacy, but prohibiting the commercial sale of sex.¹⁴⁵

The right to freedom of trade, occupation and profession

127 Section 22 of the Constitution of South Africa, 1996 reads –

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

128 Section 26, 'economic activity', of the interim Constitution of South Africa, 1993 reads –

(1) *Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.*

(2) *Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.*

129 In *S v Jordan*, a majority of the Constitutional Court held that subsection (2)¹⁴⁶ requires is that there should be a rational connection between the legislation and the legislative purpose

¹⁴¹ National Center on the Sexual Exploitation *Amicus Brief (Erotic Service Provider Legal Education and Research Project v. Gascon, 16-15927)* (2018).

¹⁴² *S v Jordan* 2002 (6) SA 642 (CC) at para [27].

¹⁴³ *Ibid* at para [28].

¹⁴⁴ *Ibid* at para [29].

¹⁴⁵ *Ibid*.

¹⁴⁶ Section 26(2) of the interim Constitution, 1993.

sanctioned by the subsection and that once it is established that the purpose of the prohibition is sanctioned by subsection (2), the question whether the purpose is justifiable in an open and democratic society based on freedom and equality is essentially a question of law.¹⁴⁷

- 130 The Court noted that it is a legislative fact that prostitution is associated with violence, drug abuse and child trafficking¹⁴⁸ and that the legislature has the responsibility to combat social ills and where appropriate to use criminal sanctions.¹⁴⁹ As long as the legislature acts consistently with the Constitution, the Court has to give effect to the legislation.¹⁵⁰ Since measures intended to eliminate the harmful effects of prostitution are clearly measures designed to protect and improve the quality of life,¹⁵¹ the Court found that criminalising prostitution does not infringe the right to economic activity.

The right to health care, food, water and social security¹⁵²

- 131 Prostitution originates primarily in severely adverse socio-economic circumstances which leave women with limited viable survival options. Women have a right to appropriate social assistance when they are unable to support themselves and their dependants. If women were adequately provided with health care services, food and water, and social security, they would not be driven to prostitute themselves and they would be protected from all the harms associated with prostituting oneself.
- 132 We submit that this socio-economic right strikes at the heart of the root cause of prostitution. Research suggests that most women in prostitution indicate that they would leave prostitution if they could survive economically without having to prostitute themselves.¹⁵³ Overall, prostitution does not benefit women in prostitution, as the harms by far outweigh the income received. The SALRC found that although prostitution may have some “superficially attractive short-term financial benefits, it has not been shown to lift women out of a lifetime of poverty and economic inequality.”¹⁵⁴ In fact, Farley notes that decriminalising the demand side of prostitution should not be seen as an attempt to protect and empower women in prostitution, but rather as “attempts to

¹⁴⁷ *S v Jordan* 2002 (6) SA 642 (CC) at para [23].

¹⁴⁸ *Ibid* at para [24].

¹⁴⁹ *Ibid* at para [25].

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* at para [26].

¹⁵² Section 27 of the Constitution of South Africa, 1996

¹⁵³ M Farley “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” *Violence Against Women* at (October 2004) at 1095.

¹⁵⁴ SALRC Report *Project 107 Sexual Offences Adult Prostitution* (June 2015) at xvii and xviii.

remove all obstacles to conducting the business of prostitution”, meaning the pimps and brothel owners enjoy the bulk of the financial gains of prostitution.¹⁵⁵

133 As to health care, prostitution has a devastating effect on the health of women, regardless of whether it is legalised or not.¹⁵⁶

134 We submit that the protection and promotion of the socio-economic rights of vulnerable women should be the main focus if we are serious about actually making a positive difference in the lives of women in prostitution and women generally.

D.2.3 Conclusion: The extent to which law reform is required?

135 We submit that the harms of prostitution are inherent in the activity of prostitution itself. On the ‘prevention of harm’ and ‘improvement of quality of life’ policy considerations, law reform will only be required if two factors were present:

135.1 If the harms and the social/economic marginalisation of prostitution flow either solely or mainly from the fact that prostitution is fully criminalised (current status of our law), as opposed to from the act of prostitution itself and/or its underlying causes; and

135.2 If the decriminalisation of prostitution, whether fully or partially, would result in the reduction or negating of the harms of prostitution and improvement of the quality of life for prostitutes.

136 As discussed hereinabove, the conclusion is inescapable - the fact that prostitution is a criminal offense is not the sole or main cause of the harms, health risks, gender discrimination and social/economic inequalities of prostitution.

137 As such, it would therefore be inconceivable that the decriminalisation of prostitution will address the harms and improve the social circumstances for women.

138 In addition to the policy-bases for criminalising prostitution, it is also completely constitutionally sound, as already found by the Constitutional Court in *S v Jordan*.

¹⁵⁵ M Farley “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” *Violence Against Women* at (October 2004) at 1091.

¹⁵⁶ M Farley “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” *Violence Against Women* at (October 2004) at 1097.

139 Furthermore, based on our discussion above, we submit that prostitution involves the violation of a number of fundamental rights and falls short of the ideals of the objective normative value system contained in our Constitution.

Probable adverse unintended consequences of decriminalisation

140 It is noteworthy that the SALRC, a specialist body, after conducting thorough research on the issue of adult prostitution, does not support the option of full decriminalisation of prostitution, but only support either the retention of full criminalisation (with diversion programmes) or partial criminalisation.

141 According to Melissa Farley, when prostitution is legalised, it gets worse.¹⁵⁷ According to Farley, there can be “excellent laws that are aimed squarely at abolishing the institution of prostitution while at the same time supporting the women in it to escape”.¹⁵⁸ Farley refers to the example of Australia, where the legalising of prostitution produced a prostitution culture characterised by “increased illegal as well as legal prostitution, increased presence of organized crime, increased demand for prostitution, increased child prostitution, and increased trafficking of women for the purpose of prostitution”.

142 Legalising prostitution does not protect women in prostitution. In New Zealand prostitution was legalised in 2003. The legalising of prostitution has not reduced social stigma,¹⁵⁹ has not addressed gender, race and class inequalities,¹⁶⁰ and violence and sexual abuse in prostitution continued as before.¹⁶¹

143 Farley emphatically states that “it is a cruel lie to suggest that decriminalization or legalization will protect anyone in prostitution. There is much evidence that whatever its legal status, prostitution causes great harm to women.”¹⁶² Similarly, Julie Bindell states that decriminalising prostitution, benefits pimps and brothel-owners, not women and consequently abolition is the only progressive solution.¹⁶³

¹⁵⁷ M Farley “Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly” *Yale Journal of Law & Feminism* (2006) at 136.

¹⁵⁸ Ibid.

¹⁵⁹ M Farley “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” *Violence Against Women* at (October 2004) at 1092 and 1093.

¹⁶⁰ Ibid at 1095.

¹⁶¹ M Farley “The Real Harms of Prostitution” (19/10/2010)

https://www.mercatornet.com/articles/view/the_real_harms_of_prostitution/8143

¹⁶² M Farley “Bad for the Body, Bad for the Heart”: Prostitution Harms Women Even if Legalized or Decriminalized” *Violence Against Women* at (October 2004) at 1094.

¹⁶³ J Bindell “Why prostitution should never be legalised” (11/10/2017)

<https://www.theguardian.com/commentisfree/2017/oct/11/prostitution-legalised-sex-trade-pimps-women>

144 Legalising prostitution does not address the harms of prostitution and opens the door to increased criminal activities surrounding prostitution, like human trafficking. Legalising prostitution may lead to the harms associated therewith, such as violence and abuse, to become more socially acceptable as the practice of prostitution is legally condoned. This will put prostitutes at an even greater disadvantage as their physical and mental abuse will likely become more tolerated by society and the state.

Criminalisation of the conduct of the prostitute

145 Acts of prostitution cannot occur without both the prostitute and the buyer engaging therein. If there were no prostitutes, there would be no prostitution.

146 Undoubtedly, many buyers actively seek out prostitutes, but prostitutes themselves also solicit and advertise to buyers. However, solicitation and/or advertising of prostituted services, often play a role in the causal chain leading to engagement in prostituted services. For example, a man who has been drinking, but who would otherwise not have used prostituted services, might succumb to the prostitute's solicitation as his own decision-making ability is impaired. One cannot deny the part the prostitute plays in causing engagement in prostituted services.

147 Without making any concessions to any extent, we submit that it would be reasonable and justifiable to criminalise prostitutes' conduct in as far as it concerns solicitation and the advertising of sexual services.

D.3 *Law reform proposals*

D.3.1 *Full criminalisation (with diversion)*

148 The SALRC Report lists the option of full criminalisation with diversion as its first alternative. In this option, all aspects of prostitution and prostitution-related activities remain criminalised. This option includes the important imperative of diversionary programmes to help women exit prostitution.

149 We support this option because it legally recognises that prostitution is undesirable since it is a human rights violation and inherently violent and exploitative. It recognised that, as is the case with drugs, society through the legislature has a duty to protect its people from harmful practices.

150 We are also encouraged by the recognition of this option that women need help to exit prostitution. It recognises that the majority of these women are victims of their circumstances to a significant degree. We would suggest that the criminal record of women who successfully exit prostitution, as far as their record relates to prostitution and prostitution-related activities, be expunged.

D.3.2 *Partial decriminalisation (prostitute not criminalised)*

- 151 The SALRC Report lists the option of partial decriminalisation as its second alternative.
- 152 We support the focus of this option to address the demand side of prostitution. This option, which is known as the Nordic-model, is garnering significant support in an increasing number of jurisdictions.
- 153 This option also recognises that prostitution is harmful and needs to be eradicated and that prostitutes are victims of sexual exploitation. For this option to be practically effective, law enforcement has to actively address the demand side of prostitution. Otherwise, prostitution and prostitution-related activities will continue or even increase. The demand side of prostitution is already not deterred by the criminalisation of prostitution. Therefore, if the demand side is not actively policed, this option will not be effective to eradicate prostitution.
- 154 It is generally known that the South African police force faces challenges relating to management, resources and staff. Unless a specialised prostitution unit can be established and maintained, we cannot support this option, because if this option is not effectively implemented, it will likely do more harm than good.
- 155 Furthermore, we also have reservations about decriminalising inherently self-harming behaviour that constitutes a basic human rights violation. Again, to use the example of harmful drugs, society has a duty through the legislature to prohibit such activities.

D.3.3 *Socio-economic interventions and exit programs*

- 156 Since the origin of prostitution is socio-economic circumstances coupled with commodification/devaluation of women, the only way to effectively eradicate the harms of prostitution is to address the socio-economic circumstances that give rise thereto. The challenge to eradicate prostitution is therefore a developmental challenge. This is admittedly an enormous challenge and we appeal to the MPWC to focus their attention on the development of social and economic development strategies that will focus on the socio-economic upliftment of women and ultimately enable women caught in prostitution to exit from it.
- 157 We also propose that civil society be encouraged, incentivised and enabled to establish strong and sustainable diversion programmes to help women to permanently and successfully exit prostitution. These programs will have to focus on economic and social re-integration, psychological counselling and education with a focus on skills training that will enable women to join the formal labour force. We suggest that the MPWC can play an important role in initiating a participatory process that will start to build the infrastructure for such programmes.

158 Community-based initiatives should seek to provide education and employment opportunities, and social and financial support for vulnerable women. Government could provide infrastructure and support (through incentives etc.) for community-based initiatives.

159 Since prostitution is closely linked to gender-based violence, racism, sexism and class prejudice, any socio-economic strategy should also focus on identifying, addressing and eradicating gender and other inequalities.

D.3.4 Conclusion regarding proposals for law reform

160 In light of the foregoing, we propose the retention of the total criminalisation of prostitution coupled with strong diversion programs. A human rights-based society cannot condone and tolerate human rights violations that originate from the vulnerability of a group of persons which renders that group relatively powerless and easily exploitable due to their desperate socio-economic circumstances.

161 If prostitution is legalised, as one survivor put it, “to be prostituted is humiliating enough; to legalize prostitution is to condone that humiliation, and to absolve those who inflict it. It is an agonizing insult.”¹⁶⁴

162 If prostitution is legalised, we will fail the socio-economically marginalised women of South Africa. The harms of prostitution are inherent therein and severe. The only way to protect women and society from these severe harms, is to eradicate it by all available means, including - to focus on eradicating demand for prostitution, to actively establish viable opportunities for women to exit prostitution and/or not enter prostitution in the first place and through legal/criminal prohibition.

163 We therefore support the SALRC’s first option, being the total criminalisation of prostitution (with diversion).

D.4 CONCLUSION

164 In light of the above, we want to reiterate that prostitution is inherently exploitative in nature and rightly seen as a human rights violation. Prostitution is caused by desperate socio-economic circumstances, gender and economic inequality and often psychological trauma in the form of

¹⁶⁴ Lauren Hersh (Equality Now) “Legalized Prostitution has Not Reduced Stigma or Exploitation” (23/09/2013) <https://womennewsnetwork.net/2013/09/23/legalized-prostitution-stigma/>

sexual abuse. Engaging in prostitution exposes already vulnerable and exploited women to even more harm.

165 We conclude with a word of caution by re-affirming what we have stated above: The SALRC came to its conclusions after a thorough process of investigation, public participation, consideration of research and law on a global scale and proper application of all its observations to the South African context. Findings based on such extensive work by a specialist body designed and mandated to make recommendations to government should only be departed from in the most exceptional of circumstances, for example if it could conclusively be proved that to follow the recommendations would result in grave injustice.

166 We submit, based on our discussion herein, that neither of the SALRC's proposals will result in a grave injustice and government and Parliament accordingly should not deviate from its conclusions and proposals.

167 In this regard, the Constitutional Court's pronouncements on the nature and effect of prostitution is instructive, as it is the final arbiter on all matters of constitutional import.

168 In *S v Jordan*, the court held that:

***“Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one’s body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(aA) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.”*¹⁶⁵**

169 We trust that the above submissions are of assistance to the MPWC and look forward to your response thereto (if any) in due course. CFJ remains at the MPWC's disposal to assist in the further development of policy on adult prostitution and prostitution-related activities.

¹⁶⁵ *S v Jordan* 2002 (6) SA 642 (CC) at para [74].

170 We hereby respectfully request the MPWC to –

170.1 Allow us an opportunity to augment the current brief written submissions with more detailed comprehensive submissions at a later stage; and/or

170.2 Give us an opportunity to make oral submissions (representations) to the MPWC at the Summit scheduled for 5 March 2018 to augment these brief written submissions.

Yours faithfully,

Liesl Stander (Preparer)

and

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